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LEE LAY KIN v. FOO WAN YUNG

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
[CIVIL APPEAL NO: PA-22NCC-30-11-2020]
11 MARCH 2022

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Abstract – *When the cause of action in a second suit is independent of the contractual claim in a first suit, and that res judicata and issue estoppel does not apply as the facts between the two suits are not the same, the court is not persuaded to summarily strike out the second suit. Opportunity should be given to the claimant to prove his case in a trial, especially when the claim is premised on different facts and issues and is not obviously unsustainable.*

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CIVIL PROCEDURE: *Striking out – Application for – Application to strike out second suit – Second suit based on s. 540(1) of Companies Act 2016 – Whether director of company could be made liable for company's breach of contract – Privity of contract – Doctrine of res judicata and issue estoppel – Whether applicable – Whether plain and obvious case to be struck out – Whether claim obviously unsustainable – Rules of Court 2012, O. 18 r. 19*

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In an earlier suit, the plaintiff sued the company ('first suit') for a debt of RM76,000. The plaintiff leased plastering machines to the company and the company did not fully pay for the machines. The plaintiff entered a judgment in default against the company and the company refused to pay the judgment debt. The defendant was the sole director of the company. The plaintiff asserted that it was the defendant who caused the company to do business in such a way as to defraud its creditors and so the defendant should personally pay the company's debt. This suit was a latter suit ('second suit'). Although this second suit was based on s. 540(1) of the Companies Act 2016, much of the relevant facts related back to the first suit – how the company transacted with the plaintiff for the machines, and later refused to pay. The defendant applied to strike out this second suit under O. 18 r. 19 of the Rules of Court 2012. The defendant argued that (i) he was a director of the company – he could not be made liable for the company's breach of its transactional contract with the plaintiff as the company was a separate legal entity and the defendant was not privy to the contract; and (ii) the doctrine of *res judicata* and issue estoppel.

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Held (dismissing striking out application):

(1) Indeed, in the first suit, the plaintiff pleaded that it was the company that contracted with the plaintiff, and that the debt was owed by the company. However, this second suit against the defendant was not a claim under contract. It was a claim under a cause of action that was

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created by statute – s. 540(1). The cause of action in this second suit was independent of the contractual claim in the first suit. This court was not persuaded to summarily strike out the second suit on the ground that there was no privity of contract between the plaintiff and the defendant. Nor on the ground that the company was a separate legal entity. (paras 9 & 10)

(2) *Res judicata* and issue estoppel did not apply in the second suit – not in the context of this summary proceeding to strike out. Not all the facts in the first suit and this second suit were the same. Only the facts about the company's transaction with the plaintiff were the same. The facts about the conduct of the defendant, as the sole director of the company, and to what extent he may have been involved in the manner in which the company did its business – were not present in the first suit. (para 14)

(3) The plaintiff's claim in this second suit was in a statutory tort. It was about the conduct of the defendant – whether he was knowingly involved in the way the company did its business with the plaintiff; and whether the company conducted its business with the plaintiff with an intent to defraud the plaintiff. This s. 540(1) cause was premised on different facts. The issues were too different. (para 15)

(4) The plaintiff should be given the opportunity to prove his s. 540(1) claim against the defendant in a trial. Just the same as the defendant would have the opportunity to defend against the claim in a trial. This second suit was not a 'plain and obvious' case to use the summary procedure under O. 18 r. 19 to strike out the plaintiff's statement of claim. The plaintiff's claim was not 'obviously unsustainable.' (paras 26 & 27)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062 CA ***(refd)***
Double Acres Sdn Bhd v. Tiarasetia Sdn Bhd [2000] 7 CLJ 550 HC ***(refd)***
Lama Tile (Timur) Sdn Bhd v. Lim Meng Kwang & Anor [2015] 3 CLJ 763 CA ***(refd)***
North West Water Ltd v. Binnie & Partners (a firm) [1990] 3 All ER 547 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 304(1)
Companies Act 2016, s. 540(1)
Rules of Court 2012, O. 18 r. 19

For the applicant - Razeena Rahumathullah & Lucas Khaw Yee Kang; M/s Lim, Ho, Cheong & Lok
For the respondent - Lim Tien Loong & P Marcus; M/s Lim & Chia

Reported by Suhainah Wahiduddin

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JUDGMENT

Kenneth St James JC:

Prolegomenon

[1] This suit is about sub-s. 540(1) of the Companies Act 2016. Subsection B 540(1) sets out that if, in a proceeding against a company, it appears that the company was conducting business with an intent to defraud its creditors, the court can declare any person who was knowingly a party to the fraudulent manner in which the company was conducting its business, to be personally liable for the debts of the company. The court can make such a declaration C against that person.

[2] These are the terms of sub-s. 540(1):

> **Section 540. Responsibility for fraudulent trading**
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> (1) If in the course of the winding up of a company or in any proceedings D against a company it appears that **any business of the company has been carried on with intent to defraud the creditors of the company** or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if the Court thinks proper so to do, declare that **any person who was knowingly a party to the carrying on of the business** E **in that manner shall be personally responsible**, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.
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> (emphasis added)

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Key Facts

[3] This suit is the sequel to the dispute between the parties. In an earlier suit, the plaintiff sued the company (first suit). The first suit was for a debt of approximately RM76,000. The plaintiff leased plastering machines to the company. The company did not fully pay for the machines.

G **[4]** The plaintiff entered a judgment in default against the company. The company refused to pay the judgment debt as well.

[5] The defendant was the sole director of the company. The plaintiff asserts that it was the defendant who caused the company to do business in such a way as to defraud its creditors. And so the defendant should personally H pay the company's debt.

[6] This suit is a later suit (second suit). Although this second suit is based on sub-s. 540(1), much of the relevant facts relate back to the first suit – how the company transacted with the plaintiff for the machines and later refused I to pay.

The Application To Strike Out

[7] The defendant applied to strike out this second suit under O. 18 r. 19 of the Rules of Court 2012. Should this second suit be struck out? These are the key issues that were canvassed.

Privity Of Contract

[8] The defendant argued that as he is a director of the company – he cannot be made liable for the company's breach of its transactional contract with the plaintiff. The company is a separate legal entity and the defendant was not privy to the contract. The defendant cites *Double Acres Sdn Bhd v. Tiarasetia Sdn Bhd* [2000] 7 CLJ 550; [2000] MLJU 477 (HC) as authority for this well-settled principle.

[9] Indeed, in the first suit, the plaintiff pleaded that it was the company that contracted with the plaintiff and that the debt was owed by the company.

[10] But this second suit against the defendant is not a claim under contract. It is a claim under a cause of action that is created by statute – sub-s. 540(1). The cause of action in this second suit is independent of the contractual claim in the first suit.

[11] I am not persuaded to summarily strike out the second suit on the ground that there was no privity of contract between the plaintiff and the defendant. Nor on the ground that the company is a separate legal entity.

***Res Judicata* And Issue Estoppel**

[12] The doctrine of *res judicata* and issue estoppel dictate that in a dispute between parties, the issues that were raised and decided in an earlier suit cannot be raised again in a later suit. The policy behind this is that "it is in the public interest that there should be finality in litigation" and "no one should be vexed twice for the same cause of action": *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 (SC) at 197.

[13] I am, however, of the view that *res judicata* and issue estoppel do not apply in the second suit – not in the context of this summary proceeding to strike out.

[14] Not all the facts in the first suit and this second suit are the same. Only the facts about the company's transaction with the plaintiff are the same. The facts about the conduct of the defendant, as the sole director of the company, and to what extent he may have been involved in the manner in which the company did its business – were not present in the first suit.

[15] The plaintiff's claim in this second suit is in a statutory tort. It is about the conduct of the defendant – whether he was knowingly involved in the way the company did its business with the plaintiff; and whether the company conducted its business with the plaintiff with an intent to defraud the plaintiff. This sub-s. 540(1) cause is premised on different facts.

[16] The issues too are different.

[17] Analysing and applying the principles of *res judicata* and issue estoppel in this striking out proceeding, I am mindful not to summarily eliminate other subjects of litigation between the parties. I am guided by the judgment of the Court of Appeal in *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062; [2014] MLJU 1708 (CA) at para. [24], where the court referred to the reasoning of Drake J in *North West Water Ltd v. Binnie & Partners (a firm)* [1990] 3 All ER 547:

> [24] In *North West Water Ltd v. Binnie & Partners (A firm)*, *supra*, three defendants namely the consultant engineers, the water authority and the contractors were sued for negligence but only the consultant engineers were wholly found to be negligent. In subsequent separate proceedings where the water authority issued proceedings against the consultant engineers based on contract and negligence to recover damages, the court stated that consideration of the authorities reveal two schools of thought on the issue of the limits which should be put on the application of the doctrine of estoppel. One approach was called the broad one which held that the true test of an issue estoppel was whether for all practical purposes the party seeking to put forward some issue had already had that issue determined against him by a court of competent jurisdiction, even if the parties to the two actions were different. The conflicting approach was to confine issue estoppel to that species of estoppel *per rem judicatam* that may arise in civil actions between the same parties or their privies. Drake J in preferring the broader approach to a plea of issue estoppel said:
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> > In my judgment, this broader approach to a plea of issue estopple [*sic*] is to be preferred. I find it unreal to hold that the issues raised in two actions arising from identical facts are different solely because the parties are different or because the duty of care owed to different persons is in law different. However, I at once stress my use of the word 'solely'. I think that *great caution must be exercised before shutting out a party from putting forward his case on the grounds of issue estoppel* or abuse of process. Before doing so *the court should be quite satisfied that there is no real or practical difference between the issues to be litigated in the new action and that already decided, and the evidence which may properly be called on those issues in the new action*.
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> (emphasis added)

[18] For these reasons, I am also not persuaded to summarily strike out the plaintiff's second suit on the ground of *res judicata* or issue estoppel.

Lama Tile Authority

[19] Further, I am both guided and bound by the propositions propounded by the Court of Appeal in *Lama Tile (Timur) Sdn Bhd v. Lim Meng Kwang & Anor* [2015] 3 CLJ 763; [2015] 4 MLJ 85 (CA). This was an appeal where the respondents (defendants in the High Court) were the common directors of two companies: LMK and SLMK. LMK purchased building materials

from the appellant (plaintiff): Lama Tile. The materials were delivered and received. LMK did not pay for the materials. Lama Tile sued LMK and got judgment against LMK. LMK did not pay the judgment debt either.

[20] Before suing, Lama Tile issued a letter of demand to LMK. When LMK received the letter of demand, LMK changed its signboard to SLMK. But it continued to use the same premises, the same telephone and fax numbers and the same logo to identify its business.

[21] SLMK was a dormant company.

[22] Lama Tile filed another suit – this time against the respondents (the directors), under sub-s. 304(1) of the previous Companies Act 1965. Sub-section 304(1) is the equivalent of the present sub-s. 540(1).

[23] The High Court dismissed the claim. One of the High Court's grounds was that *res judicata* applied to the latter suit. Lama Tile appealed to the Court of Appeal.

[24] This is what the Court of Appeal said on the issue of *res judicata*:

> [22] A reading of these paragraphs will show clearly the High Court had fundamentally misconstrued the appellant's pleaded case, leading to a major error requiring our appellate intervention. Thus, if the learned trial judge had properly directed his mind to the actual pleaded case, we believe His Lordship would not have so readily concluded that the action was premature, or that it was subject to *res judicata*. Whether or not the action was premature depended on a combination of relevant facts in light of s. 304 of the Act.
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> [24] On the facts of this appeal, *there was no real issue of res judicata, since the s. 304 action is based on a specific and different cause of action provided under company legislation. It is not based on recovery for debt perse, but on the personal liability of the persons involved in the fraudulent course of carrying on the business of the company to avoid paying creditors*. One cannot reasonably conclude that reading the pleaded claim against the directors/shareholders with precision, it is the same or similar with the previous claim against the company. *Section 304 deals with dishonest conduct involving real moral blame according to current notions of fair trading among commercial men* (*Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 CLJ 68; [2003] 4 MLJ 569).
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> [27] Reverting to the issue of the claim being premature, this was an issue without merit. There was obviously no doubt that the earlier judgment was pronounced in court, and it would have force and validity as of that date of pronouncement. Equally obvious, if the appellant was minded to enforce that judgment against the company, it would have to extract the sealed judgment and serve on LMK Edaran, now masquerading as SLMK

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> Edaran, but the appellant has also elected to proceed against the respondents under **s 304. That is an independent cause of action founded on morally blameworthy conduct on their part that law and policy should not leave unremedied among commercial men**. It will create an undesirable precedent if this type of conduct is not corrected by the courts.
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> (emphasis added)

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[25] I hold that the plaintiff should be given the opportunity to prove his sub-s. 540(1) claim against the defendant in a trial. Just the same as the defendant will have the opportunity to defend against the claim in a trial.

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Conclusion

[26] In summation, applying the principles propounded in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 (SC), I find that this second suit is not a "plain and obvious" case to use the summary procedure under O. 18 r. 19 to strike out the plaintiff's statement of claim.

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[27] Nor do I find, on reading the pleadings, that the plaintiff's claim is "obviously unsustainable".

[28] On these grounds, I dismiss the defendant's striking out application with costs to follow the event (which I intend to mean that the party who succeeds after the trial will get the costs of this proceeding too).

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